DEC 23 1974

IN THE SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, *et al.*,
Appellants,

v.

JOHN C. PITTINGER, *et al.*,
Appellees,

and

JOSE DIAZ, *et al.*,
Appellees.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN NO. 73-1765 and BRIEF AMICUS CURIAE
for the National Audio-Visual Association, Inc.

GOUGLER, REICHERT & STRAUSS
Business Group
Attorneys for Amicus Curiae

2601-30 Carew Tower
Cincinnati, Ohio 45202
(513) 621-4900

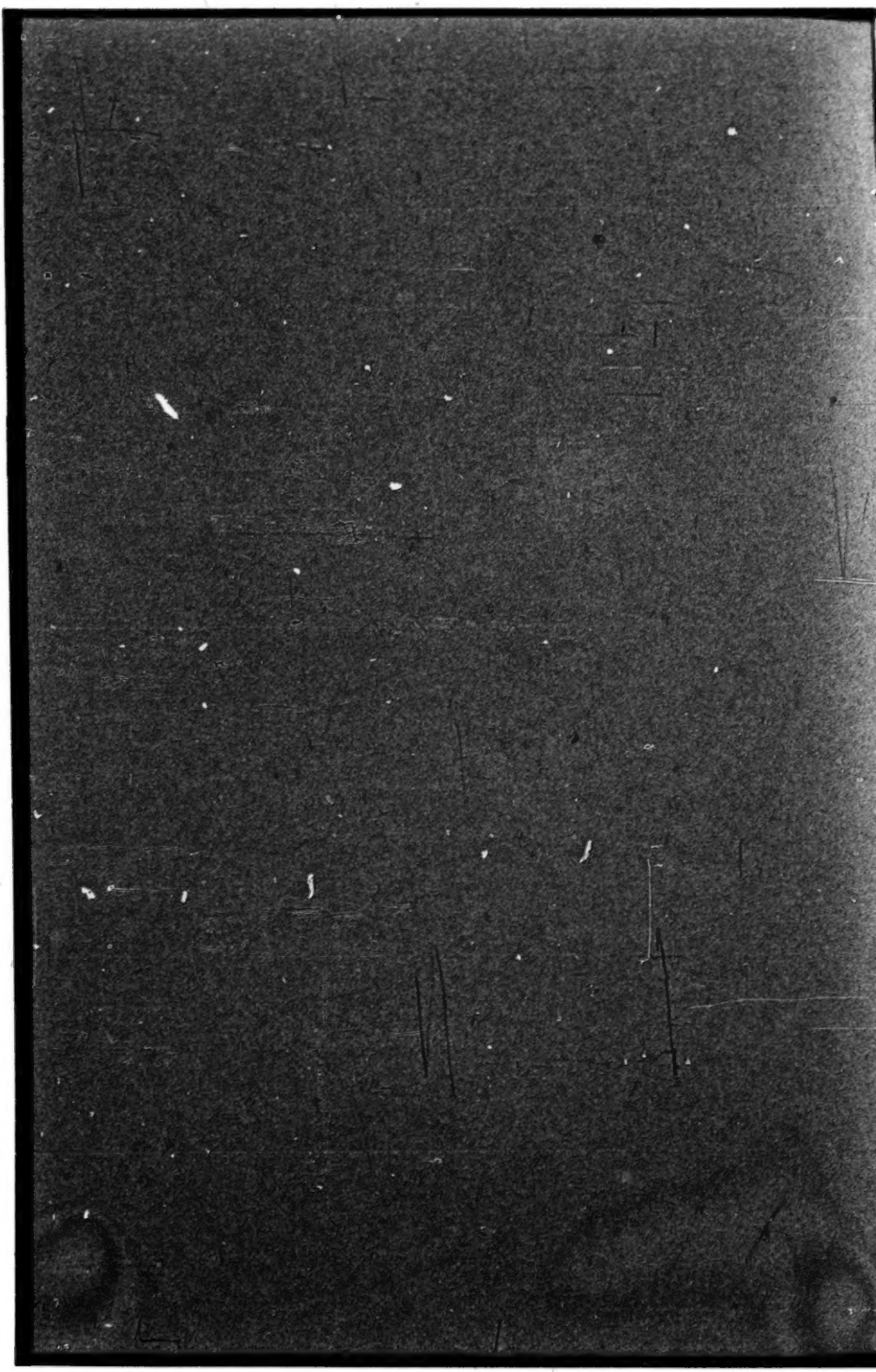

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CITATIONS

TABLE OF CITATIONS—Continued

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, *et al.*, *Appellants*

v.

JOHN C. PITTINGER, *et al.*, *Appellees*

and

JOSE DIAZ, *et al.*, *Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN NO. 73-1765

The National Audio-Visual Association, Inc., a non-profit corporation of the State of Virginia, headquartering in Fairfax, Virginia is a national trade association comprising membership within the broad spectrum of audio-visual educational and technological fields of endeavor, hereinafter referred to as NAVA.

NAVA, as a Movant, has sought consent of the parties set forth as Appellants and Appellees in this case. Counsel for Appellants and the Chesik Appellees have consented to the filing of the brief. Counsel for Appellees Pittinger et al. and Diaz

et al. have not. Therefore, this application for leave to file the Brief Amicus Curiae attached to this motion is presented under Rule 42 (3) prior to the expiration of the filing date of the briefs of the parties being supported herein.

Within the organization of NAVA are approximately 370 professional educators, librarians, and technical professionals who have a direct and compelling interest in the sustaining of the opinion of the Three Judge Federal District Court now being considered on the merits.

NAVA submits that a vital issue of construction of the Fourteenth Amendment to the Constitution of the United States should be adjudicated in this proceeding.

Appellants seek reversal of the Court below on the constitutional grounds that Acts 194 and 195 of the Pennsylvania Legislature violate the Establishment Clause of the First Amendment. They contend that to provide benefits to children who attend religious schools requires surveillance to ensure secularity and they seek to limit the First Amendment's Free Exercise Clause.

Movant submits that the failure of the State of Pennsylvania to provide children attending non-public schools with the same advantages already provided public school students creates a disparity of educational facilities resulting in unequal protection of the laws and substantive due process of law.

To presume that non-public, parochial and private schools will subvert that which the legislature plainly manifests to be secular is to minimize the constitutional guarantees of the Fourteenth Amendment for the unnecessary insulation of the Establishment Clause of the First Amendment. Absent any evidence to the contrary, it should be presumed that those who fulfill the carrying-out of the benefits ordained by the legislature are persons to whom honor and integrity would be presumed and of paramount importance.

The scope of the problems and the issues raised in this case should be construed in the light of both the First Amendment to the Constitution and the Fourteenth Amendment. Movant's compelling interest is on behalf of equal treatment of school children regardless of whether those children attend a public

school or a non-public school as long as both kinds of schools achieve the state standards. In the course of developing standards, the judicial construction of the state's obligation to provide the best education obtainable should not be reduced by limitations that are founded upon presumed diversion and presumed bad faith on the part of those persons administering the secular guidelines of both the legislature and the Court below.

Movant, on behalf of its membership, is deeply concerned that children in non-public schools shall have the benefits, privileges and protection of both First Amendment Freedom of Exercise and the Fourteenth Amendment.

Accordingly, Movant respectfully requests that the Court grant leave to file the attached Brief Amicus Curiae.

Respectfully submitted,

GOULD, REICHERT & STRAUSS
HOWARD GOULD, *Attorney for Amicus Curiae*
2613 Carew Tower
Cincinnati, Ohio 45202
(513) 621-4607

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, *et al., Appellants*

v.

JOHN C. PITTINGER, *et al., Appellees*

and

JOSE DIAZ, *et al., Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

BRIEF AMICUS CURIAE

AMICUS CURIAE AND INTEREST OF AMICUS CURIAE

Insofar as Amicus has been required to file the attached Motion for Leave to File this Brief Amicus Curiae, this Brief proper shall not repeat either a description of Amicus or reiterate the interests which have compelled Amicus to file this Brief.

STATEMENT OF CASE AND SUMMARY OF ARGUMENT

Students of the Commonwealth of Pennsylvania who have chosen to attend non-public institutions in furtherance of their religious beliefs have had their freedom to exercise religion unduly burdened by the fact that the educational benefits available in public schools were superior to those in non-public institutions. Therefore, a student was faced with the choice of either forfeiting otherwise available public education facilities for the sake of his religious pursuits, or forsaking his religious school training in favor of acquiring added secular educational benefits.

Under the so-called "new equal protection" or "substantive equal protection" analysis, as enunciated in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and most clearly refined in Mr. Justice Harlan's dissent therein, classifications which are wholly arbitrary or capricious ("invidious") or which are based upon "suspect" criteria and classifications which adversely affect "fundamental rights" will be held to be violative of the Equal Protection Clause of the Fourteenth Amendment, unless they are otherwise justified by a "compelling" state interest.

Although Equal Protection Clause analysis, whether in the traditional form or that of more recent vintage, is most often utilized to attack statutory schemes of state legislatures which create arbitrary classes by their enactment and bestow benefits upon some members whilst denying the same to others, case law development has adequately shown that a state need not have undertaken any truly active conduct to be guilty of so-called "state action". Thus, state action—as required under the Equal Protection Clause—includes not only action taken by the executive, legislative or judicial branches of government but also those indirect actions created by delegating public functions to private organizations and those actions which otherwise control, affirm or to some extent become involved with otherwise private action. Thus, the acquiescence by the state in conduct or a state of affairs, over which it has authority to exercise control through traditional police power or gentral welface provisions, is tantamount to "state action". The thrust of all this is that discrimination may exist though there may, in fact, have been no

formal governmental classification in the traditional legislative sense, but only the toleration by a government of conditions which have either created or have served to heighten pre-existing inequities and thereby perpetuated unfair differences among individuals.

And so it was in the Commonwealth of Pennsylvania prior to the General Assembly's passage of Acts 194 and 195. The state legislature had already long provided to public school students the auxiliary services and educational materials and equipment which 194 and 195, respectively, sought to bestow upon non-public school students. In this context, therefore, the challenged statutes were merely remedial, an effort by the legislature to equalize the educational opportunities available to all children within the Commonwealth, and from this perspective it becomes clear, then, that the educational facilities available prior to 194 and 195 were exemplary of the unequal protection of the law suffered by some children—namely, those attending non-public schools—in the Commonwealth at that time.

From within the above framework the issues of this controversy have arisen. The opponents to Acts 194 and 195 challenge their constitutionality upon the principle that the aid offered Pennsylvania's non-public institutions constitutes a benefit or subsidy to such religious schools in contravention of the Establishment Clause of the First Amendment, made applicable to the state via the Fourteenth Amendment. It has also been argued, on a more refined level, that the nature of such aid would necessitate continued surveillance by the state and thus create the sort of administrative "entanglement" between church and state prohibited as unconstitutional in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Amicus endorses the responses afforded by Appellees but wishes to present additional arguments in support of Acts 194 and 195, and as it may have become clear from the introductory part of this brief, the nature of such supporting arguments center upon the Equal Protection Clause of the Fourteenth Amendment.

Distilled to its essence the position of amicus can be stated quite simply. Prior to the enactment of Acts 194 and 195 the

inequality of educational facilities available to public vis-a-vis non-public school children created a burden upon the free exercise of religion by such children insofar as they were forced to abandon their religious school in order to seek the maximum in educational training. The free exercise of religion is an absolutely "fundamental", constitutionally guaranteed right; the right to an education, though of lesser status than a constitutional right, is fundamental in developing the capacity to exercise the most basic of rights—those bestowed under the First Amendment—and thus becomes a pivotal right. Acts 194 and 195 remedied the inequities of educational benefits offered public and non-public school students and thus served to unburden the free exercise rights of children in the Commonwealth who desired to attend non-public schools, and the Pennsylvania General Assembly specifically noted that these Acts served the general welfare of the Commonwealth in aiding education to *all* schools. Therefore, inasmuch as the striking down of 194 and 195 would resurrect the aforementioned inequalities, unless the opponents of these two Acts can show a "compelling" state interest to do so, the doctrine of the new substantive equal protection would necessitate that such Acts be upheld; the only "compelling" interest put forth by the opponents is that (a) the state must maintain a wall between church and state and (b) the benefits accruing under the Acts would fail to satisfy the non-entanglement requirement in *Lemon v. Kurtzman, supra.* And, since amicus believes that Appellees have carried their burden of refuting the opponents' above contentions, amicus would urge this Court to uphold the constitutional validity of Acts 194 and 195 and not forsake the aid which they offer to the children of Pennsylvania.

ARGUMENT

I. THE FREEDOM TO PRACTICE RELIGIOUS BELIEFS IS A FUNDAMENTAL RIGHT GUARANTEED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH.

The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. This freedom of religion is guaranteed against state infringement by the Due Process Clause of the Fourteenth Amendment, i.e., the right to pursue any religion according to the dictates of one's own conviction is inherent in the concept of "life and liberty" protected by the Fourteenth Amendment. *Hamilton v. Regents,* 293 U.S. 245 (1934).

The Free Exercise clause is designed to protect against governmental compulsion as to an individual's religious practices and would include governmental action, whether state or federal, which would impede an individual's observance of his individual religious beliefs. *Gillette v. U.S.,* 401 U.S. 437 (1971).

All that is required under this clause to activate a plaintiff's standing is his claim that some governmental action or omission operated against him as an individual in the practice of his religion, and that the effect of such action had been so coercive as to constitute an interference with his personal right of worship. *McGowan v. Maryland,* 366 U.S. 420 (1950); *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

In regard to students per se, and their parents, prior decisions of this Court have fostered the view that the Free Exercise clause guarantees rights sufficiently exulted or "fundamental" so as to predominate over state regulatory legislation which was otherwise reasonable and serving a legitimate or valid state purpose. The fundamentalness of both the student's and the parent's right to chart a child's educational course have been borne out.[1]

[1] For example, it has already been determined that although a state may properly prescribe minimum educational standards for all children in the state, the state cannot, however, mandate that all children therein be educated in public schools.

In the instant case it cannot be denied that so long as the Pennsylvania non-public schools meet the state-imposed minimum standards for accreditation, a child's choice to attend such a non-public school, in furtherance of his religious beliefs, is a choice which is constitutionally fundamental and protected under the Free Exercise Clause as applied to the state through the Fourteenth Amendment.

II. THOUGH THE RIGHT TO AN EDUCATION MAY BE OF LESS CONSTITUTIONAL STATURE THAN THE RIGHT TO PRACTICE ONE'S RELIGION, THERE IS, NONETHELESS, A VALID STATE INTEREST TO BE SERVED IN EDUCATING ALL CHILDREN WITHIN THE STATE.

This Court has suggested that a free public education is a privilege which the State may bestow upon citizens, not a constitutionally guaranteed right. See *Missouri ex rel. Gains v. Canada*, 305 U.S. 337 (1938). There can be no doubt, however, that in our society an extremely close nexus exists between the education of citizens and the exercise of those rights and values that have been deemed as constitutionally guaranteed.

The classroom itself has been referred to by this Court as the "market-place of ideas". *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). This Court, furthermore, has written that students in general have the right "to inquire, to study, and to evaluate to gain new maturity and understanding . . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). It would seem axiomatic that some degree of formal education would be necessary for any individual to even appreciate, let alone exercise those most fundamental of constitutional rights

---

Pierce v. Society of Sisters, 268 U.S. 510 (1925). The rationale in *Pierce* was that such a mandate constituted an interference with the parent's right, as protected under the due protection clause of the Fourteenth Amendment, to dictate the type of education which their child shall receive. Further the Court has held a more extreme position that a state's interest in compulsory education can be outweighed by a balancing of interests, by the parent's "free exercise" rights. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the informal education fostered by the Amish, which had enjoyed a three hundred year long history was considered part of their religious way of life. On the other hand certain religious practices—such as polygamy and bigamy [*Reynolds v. U.S.*, 98 U.S. 145 (1878)] and anti-X-ray and vaccination practices [*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)]—have been outweighed by state regulatory legislation.

as conferred upon him by the First Amendment, for how could any citizen take advantage of his right to exercise free speech, to form associations or to take in this country's political process, unless he has been prepared to gather, to evaluate, and then to act upon the information to which he is exposed in an intelligent manner?

It is important to note, moreover, that whereas the right to education may not be of constitutional stature it still holds a rather unique place in terms of priorities. The state, of course, has no affirmative duty to provide its inhabitants with a minimum standard of living. Several reasons may be suggested why this duty has failed to gain the dignity of a constitutional right. The most obvious reason, however, would seem to be that the guarantee of a minimum standard of living would appear to be on an entirely different level of fundamentalness from, say, effectively equal access to the criminal process or the political process. But, although it would be mistaken to extend the equal protection clause to such a guarantee, would this be true in the case of education? Is not the provision of an education as a state benefit proper precisely because it is the sort of benefit which we customarily think that the state is in the habit of distributing to all?

Therefore, although an individual's right to an education may not be a fundamental right in the strictest constitutional sense, in the final analysis, it is undeniable that an adequate education is indispensable to any individual, as well as to the well-ordered society to which he belongs, if he is to be afforded an opportunity to truly understand, appreciate and act upon principles which have themselves been held to be constitutionally fundamental.

III. ACTS 194 AND 195 ATTEMPTED TO EQUALIZE THE DISPARITY BETWEEN PUBLIC AND NONPUBLIC SCHOOLS THAT HAD EXISTED PRIOR TO THEIR ENACTMENT.

Acts 194 and 195 amended the Pennsylvania Public School Code of 1949 (24 P.S. Secs. 1-101 to 27-2702) by authorizing the Department of Education to provide certain educational

benefits to non-public school students *which had already been provided to public school students*. Act 194 authorized a variety of "auxiliary services" and Act 195 authorized textbooks as well as a variety of "instructional equipment" and "instructional materials".[2] Under various sections of the Pennsylvania Public School Code, the Commonwealth had already been providing such auxiliary services, as well as similar textbooks and instructional equipment and materials, to pupils attending public schools.[3]

The consequence of the aid provided by these Acts was to obviate the necessity for a Commonwealth student to decide whether his religious training would be sacrificed in order to acquire the maximum educational benefits otherwise available to him in the public educational system. This, in turn, would unburden him in the free exercise of his religion.

As previously discussed, although the right to an education may not be a specifically guaranteed constitutional right, its fundamental role in our society is indubitable. The Pennsylvania General Assembly most certainly recognized the need to adequately educate *all* children within the Commonwealth.

The Legislative Findings & Declaration of Policy for both Acts 194 and 195 contain the following expression: "The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities." That the General Assembly considered the furtherance of education as valid state interest, as matter of public welfare, is therefore clear.

Inasmuch as approximately one-quarter of all children in the Commonwealth attend non-public schools, the intent of the General Assembly in enacting Act 194 was to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth could equitably share in the benefits thereof. A parallel expression of intent—to confer the benefits of text-books and instructional materials upon all such children, and not merely public school children—was expressed by the

---

[2] The precise nature of such services and materials has been cited in the Motion to Affirm filed by Appellee Chesik, et al., p. 4, as well as elsewhere in the records and shall not be repeated herein in any detail.

[3] See, e.g., 24 P.S. Sec. 9-951-9-971 and Sec. 8-801,8-807.1.

General Assembly in regard to Act 195, intending that *all* students within the Commonwealth share in these added educational benefits.

It is extremely important to take note of the fact that the General Assembly itself recognized that non-public Schools could be relied upon to provide the secular facets of education within the state. Although Acts 194 and 195 did not become law until July 12, 1972, the General Assembly of Pennsylvania had much earlier recognized the need to equalize the educational benefits available to public and non-public school students. The Pennsylvania Constitution formerly provided: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public schools*, wherein all the children of the Commonwealth above the age of six may be educated."[4] (Emphasis added). In 1967, this provision was reworded and now reads: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public education* to serve the needs of the Commonwealth."[5] (Emphasis added). Still later, the legislature declared that:

> "the government *duty* to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through non-public education. Pa. Stat. Ann. Tit. 24, Sec. 5602(3) (1968). (Emphasis added)

IV. THE NEW EQUAL PROTECTION STANDARD REQUIRES THAT THERE BE A "COMPELLING" STATE INTEREST TO JUSTIFY ANY CLASSIFICATION SCHEME THAT PLACES AN UNDUE BURDEN UPON THE EXERCISE OF A CONSTITUTIONALLY "FUNDAMENTAL" RIGHT.

A. The New (Substantive) Equal Protection Standard

In his concurring opinion in the case of *San Antonio Independent School District v. Rodriguez*—U.S.—93 S.Ct. 1278—

[4] Penn. Const. Art. X, Sec. 1 (1966).
[5] Penn. Const. Art. III, Sec. 14 (1967).

U.S.—36 L.Ed. 2d 16 (1973), Mr. Justice Stewart observed that the Equal Protection Clause created no "substantive rights" or liberties, but rather that the function of the Equal Protection Clause, is simply to "measure the validity of classifications" appearing in state laws. The traditional Equal Protection Clause analysis rested upon the basic presumption of the constitutional validity of a duly enacted state (or federal) law, and the measure applied in such cases was the standard that classifications, if they existed, must have been reasonable, not arbitrary, and must have rested upon grounds not wholly irrelevant to the achievement of the state legislature's objective in having enacted such a law. Insofar as any classification, by definition, entails some degree of inequality of treatment, the test could not have been whether the law in question affected some individuals differently from others. Rather, the measure of reasonableness of a classification required only that those who were similarly situated were treated similarly.

During Chief Justice Warren's final Term, the Court handed down its decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which it was held that state-imposed residence requirements in welfare laws were unconstitutional insofar as such requirements placed an undue burden on the constitutionally guaranteed right to travel among the states. In upholding the Equal Protection Clause argument put forth therein the Court applied its most developed formulation statement of the so-called 'new equal protection': statutory classifications which are wholly arbitrary or capricious ("invidious") or which are based upon "suspect criteria" and classifications which adversely effect "fundamental rights" will be held to be violative of the Equal Protection Clause unless they are justified by a "compelling" state interest.[6]

Although Mr. Justice Harlan dissented in *Shapiro*, he nonetheless carried the new equal protection type analysis to a more refined level by analyzing the compelling interest doctrine into its two "branches": The "suspect criteria" standard and the

[6] Compare this to the less strict traditional standard earlier expressed by Chief Justice Warren: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived of to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426.

"fundamental right" standard. Moreover, as Mr. Justice Harlan noted in his dissent, these "branches" are not necessarily mutually exclusive, for when the statutory classification is grounded precisely upon the exercise of a "fundamental" right both "branches" of the compelling interest doctrine may be shaken.

The Equal Protection problem inherent in this Court's determination of the constitutionality of Pennsylvania Acts 194 and 195 will most certainly encompass both "branches" of the new equal protection doctrine. It will involve the "fundamental right" standard insofar as it has been argued that unless Acts 194 and 195 are upheld an undue burden shall be placed upon the constitutionally fundamental Free Exercise rights of students in the Commonwealth; it will involve the "suspect criteria" standard inasmuch as distinctions have been made in the two basic ways in which Commonwealth students have carried out this Free Exercise right, i.e., by attending public school or by attending non-public, religious schools.

The difficulty in presenting an equal protection analysis of the instant case is that it is herein being argued that it is the *failure to uphold* Acts 194 and 195 that will result in denial of equal protection to those benefitting under these statutes. This twist in analysis results from the fact that prior to the enactment of 194 and 195 those choosing to attend non-public schools had suffered quite severe restrictions upon their fundamental right to pursue their religion. In this sense Acts 194 and 195 are remedial in nature, and thus the starting point in appreciating the thrust of an equal protection argument is in realizing that it was the precise absence of these statutes that had constituted and perpetuated unequal treatment under the laws.

B. The New Equal Protection Standard as Applied to Acts 194 and 195

From the Appellees' point of view, Acts 194 and 195 can be seen to be an effort to equalize educational opportunities between public and non-public institutions. In remedying the pre-existing inequities, these Acts served three distinct constitutional ends. By allowing a parochial school student to attend a reli-

gious-affiliated school and at the same time be exposed to the maximum in educational benefits which the Commonwealth has to offer, these Acts have: (a) unburdened the student as to his need to choose whether he would sacrifice his *pursuit of religion* in order to achieve the maximum secular education the state could offer; (b) benefitted every child in the Commonwealth by providing a *broad-based education system* to facilitate exercise of the right to an education; and (c) furthered the valid state interest and public welfare of *educating all Commonwealth children* in the most mutually satisfying manner.

Therefore, unless a "compelling" state interest can be shown as to why these benefits should be forsaken, the new equal protection standard would dictate the upholding of Acts 194 and 195.

V. THE OPPONENTS TO ACTS 194 AND 195 HAVE SUGGESTED THAT THESE ACTS WOULD FAIL TO MEET THE NON-ENTANGLEMENT STANDARD SET FORTH IN THE CASE OF LEMON V. KURTZMAN AND THAT THE ACTS WOULD CONSTITUTE A SUBSIDY TO RELIGIOUS SCHOOLS IN VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT: NEITHER OF THESE CONTENTIONS HAVE BEEN ESTABLISHED AND NEITHER WOULD BE "COMPELLING" ENOUGH TO FORSAKE THE BENEFITS ACCRUING UNDER ACTS 194 AND 195.

A. Acts 194 and 195 Meet the Requirements of Lemon v. Kutrzman and Related Cases.

Appellees Chesik, et al., in their Motion To Affirm have completely and succintly outlined the manner in which these Acts do in fact meet the requirements set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971, *PEARL v. Nyquist*, 413 U.S. 756 (1973), *Sloan v. Lemon*, 413 U.S. 825 (1973) and related cases. They have met this burden and for purposes herein Amicus adopts and supports their arguments.

B. If the Requirements in Lemon v. Kurtzman Have Been Met Then It Follows That These Acts Are Not Violative of the

Establishment Clause of the First Amendment; Moreover, the Establishment Clause Ought Not Supersede This Legislation In Any Event Insofar As the Free Exercise Clause Would Become Re-encumbered.

Even if it is assumed for the sake of argument that the Acts in question did serve to somewhat erode the "wall" between church and state, the question still remains unanswered as to whether the preservation of this wall of separation would be an interest of the state sufficient in magnitude to justify relinquishing the benefits accruing to non-public school children, as well as the Commonwealth as a whole, thereunder. In addition, it has already been indicated that these Acts have operated in a direct and beneficial way in regard to the right to pursue one's religious beliefs and in the regard to the right to acquire an education.

This Court, therefore, is faced with the task of trying to balance the interests of the state in safe-guarding the wall between itself and religion and the interests of the state in providing an education to *all* of its children, whether they are attending public or non-public institutions. It would seem difficult indeed to deny that the separation of church and state is a constitutional principle which finds its roots in the beginning of our constitutional history, but it would be just as difficult to deny that the freedom to worship as one pleases is a constitutional principle of no less force. Therefore, in tipping the scale in favor of the latter of these rights it is necessary to show that the reasons therefor are somehow more "compelling".

The first and most persuasive argument favoring the free exercise of religion can be found in the presently developing concept of "substantive" equal protection, a notion which, in its simplest terms, calls for the Judiciary to infuse into the concept of 'equal protection' the rights, values and benefits which have long been needed, yet wanting.

There have been and continue to be classifications which, although they are not irrational in the traditional equal protection sense, are nonetheless unconstitutional, or ought to be considered so, in that they create or perpetuate inequities that are simply unacceptable within the principled framework of this

country. In such cases, the new equal protection concept, being 'substantive' in nature—as compared to the empty conundrum of traditional equal protection standards, demands a higher burden of justification than the test of mere rationality.

This rationale appeared to be the thrust of Mr. Justice White's dissent, in which he was joined by The Chief Justice, in the case of *Luetkemeyer v. Kauffman,* No. 73-1612, decided October 21, 1974. Is it not the precise point of this developing sense of equal protection that there may well be an affirmative duty upon the state to provide the benefits of public welfare legislation on a state-wide scheme, so as to include those in non-public institutions who have, for traditional equal protection reasons, been denied such benefits?

In *Everson v. Board of Education,* 330 U.S. 1 (1974), this Court upheld a state statute authorizing local school districts to provide bus transportation for parochial students. The purpose of such legislation was to guarantee, as well as the state could, that school children reached the class-room in a safe and expeditious manner. In *Board of Education v. Allen,* 392 U.S. 236 (1968), this Court upheld a state statute authorizing the free loan of secular text-books to all students within the state, including those attending parochial institutions. The purpose of such legislation was to guarantee that all students had access to such materials. In *Lemon v. Kurtzman,* 403 U.S. 602 at 616 (1971), this Court recognized its previous position in upholding a state's providing free school lunches as well as a variety of health services to all students within a state. Why, then, should this Court even hesitate to uphold Pennsylvania Acts 194 and 195? The General Assembly has acknowledged that it is a matter of general welfare that all students in the Commonwealth receive an adequate education. Are children who attend non-public schools—whether such schools are secular in nature or parochial —any the less entitled to those benefits which the legislature has already bestowed upon those children attending public institutions?

It would seem, to paraphrase Mr. Justice White, that absent a showing that there is a valid state interest—let alone a "compelling" one—supporting different treatment between those

children attending public schools and those attending non-public schools, such classification would violate equal protection principles. Moreover, it would most certainly seem legitimate to suggest that the state would in fact become the 'adversary' of religion if such classification were maintained. Therefore, unless the state were to undertake some form of affirmative action—such as legislation in the form of Acts 194 and 195—it would be acquiescing in a state of affairs that would place an undue burden upon non-public school students both in their exercise of religion and in their right to an adequate education. In short, is the state not more "compelled" to remedy the pre-existing inequalities of public vis-a-vis non-public education than it is to strike down beneficial legislation, such as the Acts in question, in the name of the Establishment Clause?

CONCLUSION

The Acts in question represent an attempt by the General Assembly of Pennsylvania to remedy a long-standing inequality of educational benefits between public and non-public education. These statutes provide services to non-public students, *not schools*, only to the extent that such services are already available to public school students. The State of Pennsylvania has not singled out any particular section of citizens so as to bestow a special economic benefit, or any other form of benefit. On the other hand, if these Acts are struck down, non-public school students will again find themselves second-class citizens, burdened by the unconstitutional choices affecting their education which they have been forced to cope with in the past. It is respectfully urged that this Court affirm the decision now on appeal from the District Court below.

Respectfully submitted,

GOULD, REICHERT & STRAUSS
HOWARD GOULD
Attorney for Amicus Curiae

2613-20 Carew Tower
Cincinnati, Ohio 45202
(513) 621-4607